Supreme Court, U.S.
FILED
APR 16 1998
CLERK

DOCKET NUMBER: 97-1533

IN THE SUPREME
COURT OF THE UNITED STATES
OCTOBER TERM, 1997

ERNEST MCDUFFIE, III, d/b/a
D & M CONTRACTING COMPANY,

Petitioner,

vs.

FIRST UNION NATIONAL BANK OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN F. MACLENNAN, Counsel
of Record for Respondent,
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20 pp

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COUNTERSTATEMENT OF QUESTION PRESENTED

Petitioner alleges that First Union violated Title VI of the Civil Rights Act of 1964 by discriminating against him in connection with a construction loan.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d provides in part:

> no person . . . shall . . . on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Based on undisputed facts, the District Court granted First Union summary judgment because, inter alia, McDuffie failed to present a prima facie of unlawful discrimination. In no way did the decision of the Eleventh Circuit conflict with the decisions of other courts of appeals or any decisions of this Court. There is no reason for further review of this matter and the petition for writ of certiorari should be denied.

CERTIFICATE OF INTERESTED PARTIES

Counsel for First Union National Bank of Florida certifies that the following persons and entities may have an interest in the outcome of this case:

D & M Contracting Company

First Union National Bank (successor by merger to First Union National Bank of Jacksonville) has no parent companies and the following non-wholly owned subsidiaries:

1560 Wilson Blvd.L.P.
2-4 Potter Place Urban Renewal
Andalusia Senior Housing, L.P.
Arbor Glenn L.P.
Arbor Village, L.P.
Ashton of Richmond Hill, L.P.
Athens Rental Housing, L.P.
Bacon Housing, L.P.
Barrett Place L.P.
Barrett Place II L.P.
Beaumont Avenue Apts., L.P.
Beechridge L.P.
Bowler Housing L.P.
BR L.P.
Business Development Corp. of SC
Camellia Court Apts. L.P.
Cannon/Hearthwood L.P.
Cantebury of Hilliard, Ltd.
Cedar Forest L.P.
Chambers Bridge Urban Renewal Housing, L.P.
City Affordable Housing LLC
Cranford Avenue Apts., L.P.
Creative Choice Homes IX, Ltd.
CTI Ltd. Partnership

Danville Community Development Corp.
Ellenton Housing Associates, Ltd.
Elm Lake Apartments, Ltd.
Equitable Realty Associates, L.P.
Evergreen Apts., L.P.
Fairbrooke Apts., L.P.
Fairfax County Redevelopment Housing Authority/HCDC One L.P.
Fairfax County Redevelopment Housing Authority/HCDC Two L.P.
Actuator and Valve Services, Inc.
Case Holdings, Inc.
Communications Systems Technologies, Inc.
Fresh Creek Technologies, Inc.
Integra Services Technologies, Inc.
Larex, Inc.
Lion Laboratories, Inc.
MaxFlight Technologies, Inc.
National Resource Directories, Inc.
Polycel Acquisition, Inc.
Allentown Development Co., Inc.
American Information Co., Inc.
Arcon HealthCare, Inc.
Atlantic Spinners, Inc.
Beacon Industrial Group LLC
Chattem, Inc.
Cybergenics Holding, Inc.
Electronic Mfg. Systems, Inc.
Envoy Corp.
Frontier Vision Partners, L.P.
FVP GP, L.P.
Genesis Direct, Inc.

Grapevine Broadcasting of Anchorage, LLC
Grapevine Broadcasting of Austin, LLC
Grapevine Broadcasting of Joplin, LLC
Grapevine Broadcasting of Wyoming, LLC
Heartland Pork Enterprises, Inc.
HTI Communications, Inc.
Meigher Communications, L.P.
Renal Disease Management by Physicians, Inc.
Right Source, Inc.
Texoil, Inc.
Universal Compression Holdings, Inc.
U.S. Salt Holdings, Inc.
First Union Commercial Leasing Group, L.L.C.
First Union/Maher Partners
Ironbrand Capital LLC
Integrion Financial Network, L.L.C.
National Auto Finance Co., L.P.
First Wells Fargo Leasing Partnership
Ironbrand Capital LLC
Integrion Financial Network, L.L.C.
National Auto Finance Co.
Multiplex Leasing Partners
First Union Commercial Leasing Group, L.L.C.
Besso Holdings Ltd.
First Union HKCB Asia, Ltd.
Wheat Int'l., Ltd.
Chronicle Securities Investment

Trust Co., Ltd.
NOVA Corp.
Flagship Partners, L.P.
Floral Oaks Apts., Ltd.
Fountain Place Associates L.P.
Fox Haven L.P.
General Homes Corp.
C4 Media Cable South, L.P.
Glen Royall Mill L.P.
Gold Rush I Apts. L.P.
Gold Rush II Apts. L.P.
Golfview Associates L.P.
Green Gables Apts., L.P.
Green Ridge Associates, LLC
Greenleaf Village of Groveland, Ltd.
Hamilton Manor L.P.
Haverhill Affordable Housing, Ltd.
Homes for Fredericksburg L.P.
Housing Equity Fund of Virginia II, L.P.
Indian Run L.P.
International Progress, Inc.
Jacksonville Affordable Housing, Ltd.
Lafayette Family L.P.
Lantana Associates, Ltd.
Laurel Pointe of Salisbury L.P.
Lieber & Co.
Manor Ridge L.P.
Martin's Landing L.P.
Martin's Landing II, L.P.
Maryland Housing Equity Fund III L.P.
Montgomery Homes L.P.
NNI Bell Street L.P.
Oak Crest Apts. of Kannapolis, Ltd.

Oldbridge Urban Renewal, L.P.
One South Place, L.P.
Orianna Street, L.P.
Peppermill Partners, L.P.
Ravenwood of Kissimmee, Ltd.
Reservoir Hill L.P.
Richmond Community Dev. Corp.
River Reach of Orange County, Ltd.
Roanoke Community Dev. Corp.
Rome Rental Housing, L.P.
Rosemont Manor, Ltd.
Sable Point II Apts. L.P.
Salem Run Associates, L.P.
Salem Run II Associates, L.P.
Sandlewood Terrace of Ludowici L.P.
Savings Associations Financial Enterprises, Inc.
Senior Cottages of Shippensburg, Ltd.
S.H.E. Urban Renewal Associates, L.P.
Shenandoah Valley Properties, L.P.
Craigmont II, L.P.
Elkmont Partners, L.P.
Grottoes Partners L.P.
Willow Lake Partners, L.P.
Southwoods L.P.
Spinnaker Reach Apts. of Duval, Ltd.
Spring Gate Manor Ltd.
St. Joseph's Affordable Housing L.P.
Statesboro Rental Housing L.P.
Steeplechase Apts., Ltd.
Stonecreek Apts. of Mooresville, Ltd.

Sugar Mill Apts., L.P.
The Atlanta Business Community Dev. Corp.
The Exchange Building L.P.
Timberleaf Estates L.P.
Tobacco Row Phase II Associates, L.P.
Ashland Joint Venture
Silver Spring Station Joint Venture
TWC Eighty-Eight, Ltd.
TWC Ninety-Eight, Ltd.
TWC Ninety-Five, Ltd.
TWC Ninety-Four, Ltd.
TWC Ninety-One, Ltd.
TWC Ninety-Six, Ltd.
VCP-Alderman Park Partners, Ltd.
Vestcor-WR Associates, Ltd.
Villa Biscayne of South Dade, Ltd.
Washington Apts. Associates, L.P.
Waterford Manor, L.P.
West Brickell Apts., Ltd.
Westville, Ltd.
Wheat Benefit Services, LLC
William Byrd Hotel Associates, L.P.
Lone Stone, L.C.
Woodlawn Joint Venture
Yorktown Arms Dev. L.P.

Michael R. Freed
John F. MacLennan
E. Lanny Russell
Honorable Harvey E. Schlesinger
Smith Hulsey & Busey
Honorable John E. Steele

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED 2

CERTIFICATE OF INTERESTED PARTIES . . . 4

TABLE OF CONTENTS 12

TABLE OF AUTHORITIES 14

CITES TO THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA AND THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT 15

COUNTERSTATEMENT OF THE CASE AND THE FACTS 16

ARGUMENT 18

I. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH THIS COURT'S OPINION IN CELOTEX OR RULE 56 FRCP 18

A. PETITIONER'S CLAIM THAT THE COURT OF APPEAL'S OPINION DOES NOT INDICATE IT CONSIDERED AFFIDAVITS FILED BY PETITIONER IS WITHOUT MERIT 18

B. FIRST UNION'S MOTION FOR SUMMARY JUDGMENT WAS NOT PREMATURELY FILED . . 19

II. THE COURT OF APPEALS DID NOT HOLD THAT TITLE VI WAS INAPPLICABLE TO FIRST UNION'S LOAN 19

III. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THE MINNESOTA COURT OF APPEAL'S DECISION IN TWIN CITY . . . 20

IV. PETITIONER'S ATTEMPT TO RELY ON EVIDENCE OF DISPARATE TREATMENT OR IMPACT NOT PRESENTED TO THE DISTRICT COURT CANNOT SUPPORT GRANTING THE PETITION . . . 21

CONCLUSION 22

TABLE OF AUTHORITIES

Cases — **Page(s)**

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 18, 19

Crawford v. Lamantia,
34 F.3d 28 (1st Cir. 1994) . 18, 21

Elliott v. Group Medical & Surgical Service,
714 F.2d 556 (5th Cir. 1983),
cert den'd, 467 U.S. 1215 (1984) 22

McDonald v. Santa Fe Trail Trans. Co.,
427 U.S. 273 (1976) 21

Twin City Const. v. ITT Indus. Credit Co.,
358 N.W. 2d 716 (Minn. App. 1984) 20

Miscellaneous

Rule 56, Florida Rules of Civil Procedure
. 18

Title VI of the Civil Rights Act of 1964,42 U.S.C. § 2000d 2, 19, 20

CITES TO THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA AND THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

Both the District Court and the Court of Appeals' decisions are unpublished.

COUNTERSTATEMENT OF THE CASE AND THE FACTS

The District Court entered summary judgment in favor of First Union on February 4, 1997, a copy of that order is contained in Petitioner's Appendix pages 12-23. None of the affidavits contained in Petitioner's Appendix (page 84-135) were filed with the District Court.

The facts underlying McDuffie's claim and First Union's defenses are adequately set forth in the District Court's opinion found at Petitioner's Appendix pages 12-23. Petitioner was the general contractor on a church construction project funded by a loan First Union made to the owner of the property. Petitioner claimed that First Union discriminated against him during the construction of this church. The District Court granted First Union's Motion for Summary Judgment because it found on undisputed facts that, among other things, plaintiff failed to present a prima facie case of unlawful discrimination.

On September 19, 1997, the Court of Appeals for the Eleventh Circuit affirmed. The court held that the District Court properly concluded that McDuffie had not made out a prima facie case of discrimination.

None of the affidavits contained in the Appendix to the "Corrected" Petition were filed by McDuffie with the District Court. Those affidavits were not filed with the Eleventh Circuit until McDuffie's Petition for Rehearing.

ARGUMENT

I. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH THIS COURT'S OPINION IN CELOTEX OR RULE 56 FRCP.

A. PETITIONER'S CLAIM THAT THE COURT OF APPEAL'S OPINION DOES NOT INDICATE IT CONSIDERED AFFIDAVITS FILED BY PETITIONER IS WITHOUT MERIT.

Rule 56, FRCP, permits the filing of affidavits in support and in opposition to motions for summary judgment. However, McDuffie did not file affidavits in opposition to First Union's Motion for Summary Judgment until he filed his Petition for Rehearing with the Court of Appeals. As such, the materials were untimely and could not properly be considered by the Court of Appeals. Crawford v. Lamantia, 34 F.3d 28 (1st Cir. 1994).

The materials submitted by McDuffie to the District Court consisted of unauthenticated documents, none of which are of the type properly considered under Rule 56. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

B. FIRST UNION'S MOTION FOR SUMMARY JUDGMENT WAS NOT PREMATURELY FILED.

McDuffie cites Celotex Corp. v. Catrett, 477 U.S. 317 (1986), for the proposition that motions for summary judgment are premature when filed less than one year after the commencement of the action. Celotex, of course, does not so hold. In Celotex, this Court concluded that a party opposing summary judgment could not complain that the motion was premature where it was filed 12 months after the complaint was filed. While First Union filed its motion less than a year after suit was filed, discovery had been completed and the motion was in no way premature.

II. THE COURT OF APPEALS DID NOT HOLD THAT TITLE VI WAS INAPPLICABLE TO FIRST UNION'S LOAN.

In the second "Reason Why Petition Should Be Granted" McDuffie argues that Title VI should apply to the loan made by First Union for the church construction on which McDuffie was the general contractor. The District Court held Title VI inapplicable because First Union recieved no federal financial assistance in connection with the loan (see Petitioner's Appendix at page 19). However, the Court of Appeals affirmed the District Court's decision because McDuffie failed to present a prima facie case of race discrimination, even assuming federal financial assistance was involved and

McDuffie had standing to sue pursuant to Title VI. Thus, the Court of Appeals decision in no way deals with the applicability of Title VI or the standing of McDuffie to bring suit pursuant to Title VI.

III. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH THE MINNESOTA COURT OF APPEAL'S DECISION IN TWIN CITY.

While any conflict between the Eleventh Circuit's decision and one by the Minnesota Court of Appeals would not justify granting the Writ, the Court of Appeal's decision in no way conflicts with Twin City Const. v. ITT Indus. Credit Co., 358 N.W. 2d 716 (Minn. App. 1984). In Twin City, the Minnesota state appellate court determined that under Minnesota state law, a contractor was a third party beneficiary of a construction loan agreement even where the agreement itself provided that no other party was entitled to rely on the agreement.

The District Court did hold that McDuffie had no standing to bring suit pursuant to Title VI because he was not First Union's borrower. But the Court of Appeals assumed without deciding that McDuffie had standing and yet affirmed the District Court's decision because McDuffie did not present a prima facie case of discrimination. Accordingly, the issue raised in Twin Cities (standing) was not decided by the Court of Appeals and does not present a reason for granting the Petition.

IV. PETITIONER'S ATTEMPT TO RELY ON EVIDENCE OF DISPARATE TREATMENT OR IMPACT NOT PRESENTED TO THE DISTRICT COURT CANNOT SUPPORT GRANTING THE PETITION.

In his fourth reason for granting the Writ, McDuffie refers to ways in which he was purportedly treated differently than white contractors by First Union. However, McDuffie presented no such evidence to the District Court. None of McDuffie's affidavits were submitted by him until his Petition for Rehearing was filed with the Court of Appeals. See Petitioner's Appendix, page 77-135. Review by the Court of Appeals is limited to the record before the District Court at the time of the District Court's ruling, Crawford v. Lamantia, 34 F.3d 28 (1st Cir. 1994). Affidavits not submitted by petitioner until after the Court of Appeals has ruled cannot be considered by this Court in determining whether to grant the petition.

The Eleventh Circuit's sole holding, that petitioner failed to make out a prima facie case of race discrimination is consistent with this Court's decision in McDonald v. Santa Fe Trail Trans. Co., 427 U.S. 273 (1976). There, this Court held that in order to present a prima facie case a plaintiff must present (i) direct evidence of intentional discrimination; (ii) evidence that plaintiff was treated differently than individuals outside of his protected category; or (iii) evidence of disparate impact. Plaintiff presented nothing except his subjective beliefs

which are insufficient to establish a prima facie case. Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 564 (5th Cir. 1983), cert den'd, 467 U.S. 1215 (1984).

The Eleventh Circuit applied these properly-stated principles in affirming the District Court's summary judgment. As Rule 10 states:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

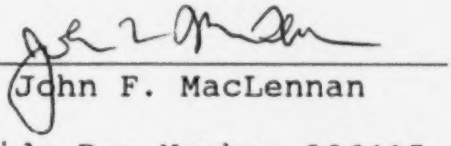
As to petitioner's claims regarding the requirement of performance and payment bonds as being discrimination, those requirements were contained in the commitment letter issued to the borrower by First Union before First Union was aware of the identity of the general contractor. Therefore, this requirement cannot be evidence of unlawful discrimination on the part of First Union.

CONCLUSION

Because the decision of the Court of Appeals in no way conflicts with the decisions of this Court or other courts of appeals, the petition

for writ of certiorari should be denied.

SMITH HULSEY & BUSEY

By 
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